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- Surely, when the wall has fallen, will it not be said to you, 'Where is the mortar with which you plastered it.'

Ezekiel[1]

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This article is dedicated to four giants of the law who took the time to personally touch my life. Professor Leroy Clark who, as a visiting Professor at the University of Maryland while I was a student, served as a great inspiration to me. His example made me believe in the great potential to change the world through teaching law. His contribution to the work of the NAACP Legal Defense Fund during the pre-*Furman* death penalty years of the fund should also never be forgotten. I would also like to thank Professor Norman Amaker, Professor Clark's colleague at the Fund, who, like other lawyers there, endlessly chased death warrants around the country saving those subjected to an arbitrary death penalty. Sadly, he passed away in June of 2000, before I could share this article with him. Professor Amaker, who did not know me, took the time to read a draft of my first article on capital punishment and urged me not to be afraid to "say where I stood" on crucial points. His efforts contributed greatly to that article and my scholarship today. Furthermore, Professor Derrick Bell provided advice about achieving tenure by urging me to write often to develop the discipline to complete my projects. And finally to the late Judge A. Leon Higginbotham who just took the time to talk to me about me, my family, my work and our collective future as a human race. His example shines for me as it does for countless others. He always made you feel like you were the most important person in the room.

Any merit in this article is due to the contribution of these great men, any errors are mine alone. Apologies for the length of this acknowledgment, but the scripture cautions that we should "withhold not good from them to whom it is due, when it is in the power of thine hand to do it." *Proverbs* 3:27 (King James). I gratefully acknowledge the contribution of Matthew Green, my research assistant, and Gloria Joy, my administrative assistant, for their efforts on this project. Furthermore, I thank the University of Baltimore Foundation for the research grant which supported this project.

1. *Ezekiel* 13:12 (New King James).

> - "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice."
>
> Justice Thurgood Marshall[2]

I. INTRODUCTION

Since the return of capital punishment after *Furman v. Georgia*[3] nearly three decades ago, the Supreme Court of the United States has struggled to control the administration of capital punishment when those decisions are made[4] or recommended by a citizen jury.[5] Although there is no constitutional requirement that a jury participate in the death penalty process,[6] most states do provide, through their capital punishment statutes, that a jury will participate in the decision.[7] The preference for jury sentencing in these circumstances reflects a reluctance to leave power over life solely in the hands of one judge.[8] Still, some scholars have long criticized juries for administering punishment.[9]

Of particular concern to the Supreme Court has been the problem of jury discretion in capital cases. Finding ways to control the deliberations of the capital jury to prevent them from rendering decisions which are as arbitrary as being "struck by lighting"[10] has been the primary focus of the Supreme Court at least since the early 1970's. If one considers the plurality opinion in *Furman* as a great wall erected to prevent continued movement toward implementation of arbitrary and capricious death sentences,[11] the public

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2. Caldwell v. Mississippi, 472 U.S. 320, 333 (1985).

3. 408 U.S. 238 (1972).

4. Generally, when judges engage in sentencing they have broad discretion in determining what they consider when passing sentence. *See* Williams v. New York, 337 U.S. 241, 244-45 (1949).

5. In some states, the jury makes a recommendation to the sentencing judge as to whether death is appropriate. *See, e.g.*, FLA. STAT. ANN. § 921.141 (West 1996).

6. *See* Harris v. Alabama, 513 U.S. 504, 515 (1995) (explaining that there is no constitutional requirement that a sentencing hearing in a capital case be conducted by a jury).

7. *See* Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 9 (1994) ("Two-thirds of the states with capital statutes and the federal government accord the jury final sentencing power.").

8. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

9. *See* Charles Kerr, *A Needed Reform in Criminal Procedure*, 6 KY. L.J. 107, 108 (1918) (explaining that unlike judges, juries lack experience in assessing sentencing considerations).

10. Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart. J., concurring).

11. The former Governor of Ohio, Michael V. DiSalle, once commented:

> [T]he question of who should be put to death in the name of the law and who should live is often decided by men influenced more by public climate and public clamor than by abstract justice. He who is to die is too frequently a man who has committed a crime at the wrong

movement which followed to reinstate capital punishment affected the mortar with which the wall was erected.[12] The jurisprudence that followed the calls for control over the arbitrary behavior of the capital jury has wavered in recent years from the commitment to place controls over the death penalty, and to insure it is a true last resort for the worst of the worst.[13]

The rise in crime that occurred during the early seventies[14] combined with the political rhetoric that emerged from partisan politics made the Supreme Court and the death penalty fair game for controversy.[15] A shift in the political climate[16] along with a change in the leadership[17] and the personnel of the Supreme Court made the fragile wall of protection erected in *Furman* increasingly vulnerable to attack.[18] Shifts in the Supreme Court majority have led to grave concerns about the fairness of capital punishment in the decades following *Furman*.[19] With aggressive state action to pass new death penalty statutes in order to resume executions, inevitably the Court has become less protective of the values advanced in the *Furman* opinions.[20]

> time in the wrong place [and] under the wrong circumstances. A different combination of the same factors could well produce a more temperate verdict.

MICHAEL V. DISALLE, THE POWER OF LIFE OR DEATH 4 (1965).

12. *See generally Ezekiel, supra* note 1, at 13:12.

13. The idea that capital punishment is reserved for the worst of the worst seems to have always been a part of the discussion of which circumstances justify a death penalty. The Supreme Court decisions attempting to regulate the death penalty have failed to limit the class of eligible defendants or to fairly administer the punishment among them. "For better or worse, the Supreme Court of the United States has launched this country on a large and risky experiment, testing whether our most severe–and the only irreversible–penalty can be applied in ways that meet reasonable standards of fairness." JAMES Q. WILSON, THINKING ABOUT CRIME 194 (1983).

14. The rise in crime during the end of the Warren Court likely contributed to the public sentiment for retaining capital punishment. *See* EARL WARREN, THE MEMOIRS OF EARL WARREN 316-17 (1977).

15. *See generally* EDWARD J. VAN ALLEN, OUR HANDCUFFED POLICE: THE ASSAULT UPON LAW AND ORDER IN AMERICA AND WHAT CAN BE DONE ABOUT IT 13-29 (1968) (suggesting that courts during the Warren years aided criminals at the risk of the safety of citizens).

16. The Supreme Court, under Chief Justice Earl Warren, revolutionized criminal justice by obligating the states to comply with the commands of the federal Bill of Rights concerning the rights of the accused. *See generally* ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 322-66 (1972).

17. *See* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 4 (1992) (discussing the conservative tendencies of the Burger Supreme Court).

18. Furman v. Georgia, 408 U.S. 238, 306-10 (1972) (Stewart, J., concurring).

19. The appointment of Clarence Thomas to the Supreme Court by President George Bush on October 18, 1991 assured that the conservative turn of the Rehnquist Court would continue. Justice Thomas has demonstrated little willingness to recognize the claims of capital defendants before the Court. *See* Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Vision of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 595, 603 (1995) (discussing the jurisprudence of Justice Thomas on capital punishment issues).

20. The only two justices to repeatedly conclude that the death penalty is cruel and unusual were Justices Thurgood Marshall and William Brennan; they are no longer on the Court. *See, e.g.*, Wilson v.

One of the primary casualties of the post-*Furman* decline in constitutional protection advances in the form of various controls on juries that decide capital cases. Decisions during the 1980's regarding what a capital jury may consider,[21] what they may not hear,[22] and what type of statutory instructions and forms must guide them[23] demonstrated some promise that *Furman* concerns would, at times, be seriously regulated.[24] However, over the last several decades the Court has issued opinions which indicate that it is more concerned with state autonomy in administering the death penalty than the defendant focused concerns of *Furman*.[25]

In my view, instructions to the capital jury are the primary vehicle of procedural protection against unjust imposition of the death penalty.[26] Unfortunately, the Supreme Court has approached its capital punishment jurisprudence without due regard to the scientific research that is available regarding how consideration of death sentences is different from other jury decisions.[27] This article is an attempt to discuss what went wrong with the Supreme Court's jurisprudence regulating capital juries and proposes some solutions that direct how the Court might increase scrutiny of jury instructions when reaching life and death decisions.[28]

Zant, 110 S. Ct. 1170 (1990) (Brennan and Marshall, JJ., dissenting from denial of certiorari).

21. *See* Lockett v. Ohio, 438 U.S. 586, 594-609 (1978) (discussing mitigating factors).

22. *See* Booth v. Maryland, 482 U.S. 496, 509 (1987) (holding that victim impact statements introduced at sentencing violates the Eighth Amendment).

23. *See* Mills v. Maryland, 486 U.S. 367, 384 (1988) (holding that the judge's instructions concerning the verdict form may have precluded the jury from considering mitigating evidence, thus the Court would not risk upholding a sentence of death).

24. "[C]hanneling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

25. Traditionally, capital punishment has been administered at the state level through a variety of sentencing schemes.

26. The Supreme Court has said that the popularity of jury trial provisions in capital cases reflects that society has a "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

27. Some scholars have gone so far as to suggest that death is so different from all other penalties that due process requires that while considering the punishment, the law should recognize a presumption in favor of a life sentence. *See* Beth S. Brinkman, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 352-53 (1984).

28. "The many studies showing that juries do not understand standard instructions very well are... [a] cause for concern. When poorly instructed juries are being asked to decide the fate of a fellow human being, that concern becomes an issue of constitutional magnitude." Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 49.

II. THE ORIGINS OF GUIDED DISCRETION

To understand how capital juries should be guided in their discretion it is useful to examine how capital punishment was administered and controlled prior to the due process revolution which preceded the *Furman* decision.[29] "America's entry into World War I led to the restoration of the death penalty in a number of states."[30] Most of those executions occurred in the southern United States. In fact, "of the fourteen states, each of which performed over 100 executions between 1930 and 1969, ten were Southern. Those Southern states together accounted for 1,901 executions: approximately half of the 3,859 total for all the United States in that period."[31]

A lack of fairness in the South was linked to the problem of racial discrimination,[32] and consequently the death penalty was linked to statistics which represented staggering disparities between treatment based on the simple equation of black versus white.[33] For example, "[o]f the 455 persons executed for rape between 1930 and 1969, 443 or 97.4 percent were executed in the South. Moreover, of those executed 398, or 90 percent, were black. In the South, eleven men were executed for burglary, all of whom were black. . . . [T]wenty-three men were executed for armed robbery, nineteen of whom were black." [34]

Compounding the problems of racial disparity in executions was the unofficial system of executions known as "lynching" which was prominent in the American South.[35] Lynching was the height of an arbitrary system of imposing death and was the means by which mobs imposed punishment when they became too angry or too impatient to wait for the traditional justice system to work.[36] Noted Historian Lawrence Freeman describes the lynching process in this way:

> [T]he mob decided that honor *demanded* direct action--the honor of the white woman, her family, and the community. The lynching was

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29. *See* SAVAGE, *supra* note 17, at 80-88.

30. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 28 (1986).

31. *Id.* at 30-31.

32. *See* M. Dwayne Smith, *Patterns of Racial Discrimination in Assessment of the Death Penalty: An Assessment of Louisiana*, 1987 J. CRIM. JUST. 15.

33. *See generally* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978) (examining the historical roots of such disparity).

34. ZIMRING, *supra* note 30, at 31.

35. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 454-55 (1988) (explaining the Enforcement Acts and the Ku Klux Klan Act which embodied Congress' response to racial violence after the Civil War).

36. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 189 (1993).

> part of an "unwritten code." Southerners distrusted the state, and preferred, in these cases, "personal justice." They "believed strongly that community justice included both statutory law and lynch law"; indeed, lynch law "was perceived as a legitimate extension of the formal legal system."[37]

Some scholars have also noted that the brutal system of punishment was not totally without explanation. "A brutal logic underlay the violence. As a rule, lynchings were not spontaneous acts against convenient blacks. Whites almost always believed that mobs punished real transgressions and that the lust for vengeance played a prominent role in lynching."[38] In the system of lynch law was the origin of the very arbitrariness of which the *Furman* decision would become concerned with years later.[39] "Moreover, the simple truth that lynching, as a form of punishment, was susceptible to the personal whims of each lyncher ensured that the jurisdiction of the lynch mob was both expansive and capricious."[40]

Not only was the arbitrariness of the lynch mob part of its operational dynamic, but the victim based elements that became part of the lynching process [41] injected an additional freakish factor into the equation that affects capital sentences even today. That is, the risk of arbitrary death sentences based on the race of the victim, and the unforeseen consequences on the family resulting from the crime against the victim.[42] During the lynch law system, these factors affected the decision to impose "death by mob" to a frightening peak.

> By avenging the murder of a white man, a mob also avenged the desecration of the ideal of the patriarchal family. The lynching of the black murderer became a bloody drama in which the white community assumed the protection of the widow and the fatherless family while at the same time it affirmed the tragic future and vulnerability the family faced.[43]

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37. *Id.* at 190.

38. W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH 49 (1993).

39. Concerns over racial discrimination in lynching and in rape prosecutions became the backdrop for many of the concerns expressed in *Furman*. Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (noting that discriminatory enforcement of the death penalty renders it unconstitutional).

40. BRUNDAGE, *supra* note 38, at 49.

41. *See generally* BRUNDAGE, *supra* note 38, at 49-85 (describing characteristics and statistics of those involved with lynching, including how they were carried out, for what reasons, and against whom).

42. *See* Elizabeth Anna Meek, Note, *Victim Impact Evidence and Capital Sentencing: A Casenote on* Payne v. Tennessee, 52 LA. L. REV. 1299, 1310 (1992) ("Even if it was relevant in a particular case, by its nature . . . [victim impact] evidence is unduly prejudicial.").

43. BRUNDAGE, *supra* note 38, at 74.

Ironically, understandable sadness for surviving victims became the driving force behind the lynch mobs who may not be inclined to act out their racial prejudice alone.

Interestingly, when the few whites who were lynched for sensational crimes were determined to be eligible for the punishment that was primarily reserved for blacks,[44] it was the result of concern for the victims since "[t]he mobs that lynched whites were comprised typically of family, friends and neighbors of the victim[.]"[45] This system varied only slightly from that in Europe during the twelfth century where it was the accusers responsibility to bring action against the perpetrator.[46] Lynching took its lead from some ancient societies that "left [it] to the families of the dead person to exact a price for the wrong that had been done to them[.]"[47]

Even luminaries like the great Oliver Wendell Holmes, Jr. recognized that some families may seek revenge as a matter of personal privilege if not legal right.[48] Justice Holmes once commented that "people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself[.]"[49] Although the instinct for revenge may be explainable, attempts to mete out punishment while considering it with combinations of other factors is itself a controversial proposition.[50]

The revenge based system of lynch law brought attention to the general condition of the justice system for African Americans. Perhaps the most famous of all early capital cases involving African Americans began with *Powell v. Alabama*,[51] which became known as the famous Scottsboro Boys cases.[52] These decisions provided the right to counsel in capital cases so that the accused could have the "guiding hand of counsel at every step in the proceedings against him."[53] A few other Supreme Court cases followed which provided more protection for the criminally accused. In *Patton v. Mississippi* racial discrimination in jury selection was prohibited.[54] It was

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44. *See id.* at 86.

45. *See id.* at 91.

46. *See generally* EDWARD PETERS, TORTURE 41 (1985).

47. MICHAEL KRONEWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 34 (1993).

48. *See generally* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 39-44 (Little, Brown & Co. 1949) (1881).

49. *Id.* at 41.

50. *See* FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 18 (1978) (explaining that "society has not only the right, but the affirmative duty, to exact the supreme penalty from foul and vicious killers").

51. 287 U.S. 45 (1932).

52. *See generally* JAMES GOODMAN, STORIES OF SCOTTSBORO (1994) (giving a detailed account of the case and its surrounding controversy).

53. *Powell*, 287 U.S. at 69.

54. 332 U.S. 463, 468-69 (1947).

followed by *Fikes v. Alabama*, which provided protection against coerced confessions. [55] Shortly thereafter, the Court decided *Hamilton v. Alabama*[56] which developed their earlier decision in *Powell* by recognizing that many cases in the South where rights were violated often "involved the rights of black defendants in southern trial courts[.]"[57]

During the 1960's, the plight of African American criminal defendants, particularly those potentially subject to capital punishment, was placed squarely in the hands of the lawyers at the NAACP Legal Defense and Educational Fund.[58] The Fund implemented what became known as its moratorium strategy.[59] Toward the end of the 1960's, social science research began to come to bear on the capital punishment process. Research done in *Maxwell v. Bishop*[60] presented a powerful statistical analysis by Professor Marvin Wolfgang that indicated racial discrimination against black defendants, particularly in rape prosecutions.[61]

That same year the capital jury itself was studied in *Witherspoon v. Illinois*,[62] where the Court considered the defendant's claim that excluding persons from the jury with general religious objections against the death penalty was improper unless the prospective juror made it unmistakably clear that his views would prevent him from considering a death sentence no matter what the evidence adduced.[63] The practice of excluding such jurors was common in many states. The evidence presented to the Court consisted of surveys suggesting that jurors who favored capital punishment were more likely to convict than those who were opposed to the penalty.[64] The Court held that it violated the Constitution to attempt to obtain a "hung jury"[65] by

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55. 352 U.S. 191, 197-98 (1957).

56. 368 U.S. 52 (1961).

57. WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA 1864-1982, at 16 (1984).

58. The NAACP Legal Defense Fund has long been involved in the struggle against the death penalty and other issues involving unequal treatment of African Americans. *See generally* JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 34-39 (1959) (explaining the purpose and objectives of the Fund).

59. *See* MICHEAL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 107 (1973)(detailing the legal strategy of the NAACP lawyers in obtaining a halt to executions by the early 1970's).

60. 398 U.S. 262 (1970).

61. 257 F. Supp. 710, 717-21 (E.D. Ark. 1966).

62. 391 U.S. 510 (1968).

63. *Id.* at 513-18.

64. *See id.* at 517 n.10.

65. The risk of a jury so closed-minded that they would quickly impose death has always been a concern of jury scholars. The importance of a unanimous jury as a protection against this problem has recently been thoughtfully discussed. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000) (discussing the dangers of non-unanimous verdicts on jury decisionmaking).

automatically excluding jurors who expressed some reservations against the death penalty.[66]

In 1971, the Supreme Court was challenged with the question of whether a jury without any standards at all could impose a death penalty in *McGautha v. California*.[67] In a six to three vote the Supreme Court held that due process did not require that a jury be required to follow established standards and guidelines in considering a death sentence.[68] Justice Harlan wrote that to establish guidelines for imposing death before the fact "appear to be tasks which are beyond present human ability."[69] One scholar insightfully noted that Justice Harlan's rationale disclosed "a fatal flaw, a kind of *reductio ad absurdum* in the death penalty itself[.]"[70]

Soon, lower courts began to respond to the logic of arguments by death penalty advocates who criticized the standardless and often discriminatory punishment.[71] As the new decade began, California, with what was then the largest death row population in the country, held that its death penalty was per se unconstitutional.[72] With a new decade dawning it appeared that capital punishment was under severe attack, primarily because of concerns that juries comprised of ordinary citizens could not be trusted to administer it fairly.[73]

III. THE PROMISE, POWER, AND PROBLEMS OF THE AMERICAN JURY

In order to understand the risk of failing to properly guide jury discretion in a capital case, it is useful to examine the traditional role of the jury in American law. From its inception the jury has been recognized for its

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66. *See Witherspoon*, 391 U.S. at 522-23.

67. 402 U.S. 183, 185 (1971).

68. *See id.* at 196.

69. *Id.* at 204.

70. Harry Kalven, Jr., *Forward: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 25 (1971).

71. *See, e.g.*, People v. Anderson, 493 P.2d 880 (Cal. 1972).

72. *See id.* at 899.

73. A few years before the capital punishment moratorium that preceded *Furman*, many believed that capital punishment may well be abolished in America. At that time, one former governor commented:

> The retentionists will not give up without a struggle. The police lobby, the sensational press, the office holders who consider success at the polls more important than solving human problems, the public prosecutors who look upon convictions merely as rungs on the ladder to higher political rewards–all are still fighting. It seems to be a losing battle.
>
> It is gratifying to know that the last barbaric relics of the Middle Ages are beginning to recede into their own darkness; that in our own time we may expect to see the twilight of hopelessness transformed into the dawn of hope; that the time may not be far off when we can say to those who have stumbled in the shadows, Night need not fall.

DISALLE, *supra* note 11, at 214.

advantages and criticized for its disadvantages. There is no institution developed by mankind more controversial than the American jury system.[74] Juries consist of ordinary citizens called on any given day, in any state, and in federal or county courthouses to resolve disputes of all kinds between people or entities.[75] Their responsibilities range from deciding whether a human being should be destroyed for criminal conduct[76] to deciding petty squabbles between neighbors.[77] Without warning a carpenter, fisherman, or salesman could be sitting in judgment for a multi-national corporation or a homeless vagrant.[78] Possibly, some persons will never serve on a jury while others may serve several times, but the range of potential jurors has raised the question of why ordinary citizens should judge such important matters without training or experience.[79] A multitude of concerns have been raised over whether juries are even capable of understanding the instructions on the law they are routinely given.[80]

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74. Complaints about the jury system have long been documented. *See* LESTER BERNHARDT ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 408-13 (1947).

75. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18-19 (1955) (discussing the merits of "plain people" deciding cases).

> The criminal trial jury has been described as the "palladium of liberty" and the "conscience of the community." For that conscience to operate in a way in which we, as a society, can be proud, we must be confident that the community is in fact a conscientious one. Unfortunately juries, like all elements of a complex society, may occasionally give us cause to question this assumption.

Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7, 8 (1997).

76. Juror participation in the death penalty partly replaces the outlawed feud and vendetta, "men and women are supposed to refrain from taking vengeance on their enemies no matter what the provocation and instead turn to the law for justice and satisfaction." LOIS G. FORER, A RAGE TO PUNISH 97 (1994).

77. At an earlier time in my legal career I was counsel in a three day jury trial that involved a fist fight between feuding neighbors that began over, among other things, a parking dispute. The loser of the fist fight sought civil damages in his lawsuit. I represented the winner of the fight who had already been convicted of simple assault in criminal court and received a minimal sentence that did not involve incarceration. After a short deliberation, the jury found that the defendant had committed the assault but awarded no damages.

The trial judge, a veteran of many decades of jury trials, had urged the plaintiffs to accept our settlement offer in chambers before jury selection, stating "I see these cases all the time and the jury is going to give you about one dollar. They do not like to lose time from work or their families to give money to neighbors who cannot get along even if they are clear who started the fight." Interviews with members of the jury after the verdict confirmed the judge's comments in chambers.

78. The broad range of people serving on juries is designed to place in "the jury room qualities of human nature and varieties of human experience." Peters v. Kiff, 407 U.S. 493, 503 (1972).

79. *See generally* John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, AM. B. FOUND. RES. J. 195 (1981) (exploring the strengths and weaknesses of European models using professional jurors).

80. There has been a longstanding debate about whether the untrained laymen should determine the

Certainly, there are other ways to resolve disputes rather than submitting them to amateur "judges." Using combat,[81] strange ordeals,[82] and other mystical forms of proof have all been tried and have failed the test of time.[83] However, our current system of jury trials has been criticized as bearing too much resemblance to trials by combat, with lawyers using "scorched earth" tactics in a win at all costs approach.[84] Such tactics before juries has shaken confidence in the jury system.[85] These problems, combined with the long-standing skepticism about lawyers,[86] have encouraged reformers to examine

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outcome of a criminal case. "[A]t the heart of the dispute have been express or implicit assertions that the juries are incapable of adequately understanding evidence or determining issues of fact... [any] better than a roll of dice." Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

81. *See generally* IAN DOUGLAS WILLOCK, THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND 3-105 (1966) (detailing the developments of the jury trial in Scotland and Great Britain).

82. *See generally id.*

> Once our world was enchanted. In this place arose an understanding of criminal procedure which permitted proofs such as throwing an accused into a pool of blessed water or having him pluck an object from a boiling cauldron. Clergy read the signs. The man whose body was received by the water or whose would heal within a specified period of time was proved innocent. In 1215 the Fourth Lateran Council forbade clergy from performing the sacred acts that attended the ordeals. In time, this form of proof died. In its place the judicially centered inquisitorial system arose in Germany, Italy, France, and the lay-centered jury system in England.

Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 110-11 (2000).

83. *See generally* WILLOCK, *supra* note 81, at 3-105.

84. Lawyers have often been criticized for their lack of integrity by members of the general public because of their willingness to obtain financial gain. *See generally* Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723 (1994) (evaluating the negative perceptions society has of lawyers and ways that image could be changed).

85. A flamboyant attorney once wrote, "an impartial jury is a myth. Each side in a [jury] trial wants jurors it believes will be sympathetic to it, so lawyers deliberately set out to select specific jurors." WILLIAM M. KUNSTLER & SHEILA ISENBERG, MY LIFE AS A RADICAL LAWYER 287 (1994).

86. As one observer documented several decades ago:

> The most comprehensive American poll of the public's attitude toward lawyers was undertaken in 1960 by the Missouri Bar.... Most of the public and the lawyers themselves believed contingent fees in personal injury cases were much too high. Many of the complaints about lawyers overcharging came from people in the Kansas City area where the prevailing contingent fee in the personal injury cases is 50 percent. Most people thought 25 percent or less would be fair. Nearly 57 percent of the people who used lawyers thought lawyers created lawsuits unnecessarily, [and] ... they didn't make enough effort to settle cases as they should.

MURRAY TEIGH BLOOM, THE TROUBLE WITH LAWYERS 332-33 (1968). "It's those flamboyant personal injury lawyers who really besmirch the profession, starchy big-firm lawyers grumble. They swoop down on disasters like vultures, sometimes even disguising their runners as Red Cross workers or priests to sign up clients." DAVID W. MARSTON, MALICE AFORETHOUGHT: HOW LAWYERS USE OUR SECRET RULES TO

the jury trial as a decision making tool.

Despite its detractors, many believe that the jury is the linchpin of our democracy, indicating our commitment to a decentralized process through citizen participation.[87] Although praised for its democratic character, it is often ostracized for its unpredictable and sometimes freakish results, some judges going so far as to say that juries are getting "dumber."[88] Many countries have largely dispensed with it,[89] and other countries like Great Britain where the jury trial was born, while not eliminating it, have drastically altered the control lawyers have in selecting those who will serve.[90]

Recently, lawyers have been going to great expense to develop techniques they believe will lead them to predict what a jury is likely to do when it deliberates a case.[91] The use of professional jury consultants has become a typical tool in high profile jury cases.[92] By incorporating science and psychology, advocates have explored ways to shape jury decisions rather than merely selecting impartial jurors.[93] Such techniques have relied in large

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GET RICH, GET SEX, GET EVEN . . . AND GET AWAY WITH IT 35 (1991).

87. One writer credits James Madison with reporting that the right to a jury trial was among "the most valuable" rights included in the Bill of Rights. ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 208 (2nd ed., Northeastern Univ. Press 1991) (1955) (quoting 1 ANNALS OF CONG. 755 (Joseph Gales ed., 1789)).

88. HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 200 (1996).

89. *See id.* at 220-21.

90. *See, e.g.*, Raymond J. Broderick, *Why Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 371-74 (1992). Peremptory challenges should be abolished in order to assure "that no citizen, on the basis of invidious discrimination, will ever be excluded from participating in this most important responsibility of citizenship[.]" *Id.* at 422.

91. Many studies have revealed that "background characteristics of jurors such as race, sex, and age, among others, have been associated with certain verdict preferences." JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 15 (1987).

92. Jury consultants typically take one of four approaches to categorize jurors:

> The *Typologists* argue that people can be categorized into various personality types that are meaningfully related to verdict preferences. . . .
>
> The *Clinicians* also rely on psychological principles and systems to rate individual jurors on their verdict preferences. . . .
>
> The *Empiricist* rely on statistical assumptions and methods to determine which kinds of people will hold a particular verdict preference. . . .
>
> The *Theoreticians* use psychological principles and empirical research methods to study each case.

Robert D. Minick, *Using Jury Consultants to Assist Voir Dire, in* PRACTICING LAW INSTITUTE, FIFTH ANNUAL LITIGATION MANAGEMENT SUPERCOURSE 294-96 (1994).

93. *See* José Felipé Anderson, *Catch Me if You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 384 (1998). *See also* JEFFERY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 176 (1994). "Scientific jury selection grew out of, and in turn pushed further, the prevailing skepticism about juries as impartial institutions of justice." *Id.*

part on racial and gender stereotyping in an attempt to predict likely decisions in particular cases.[94] The Supreme Court has complicated this area of the law making it unclear whether jury selection consultants are in any way prohibited from helping lawyers select juries by using race and gender based demographic data.[95]

On the more practical side, many observers have been concerned about the lack of interest citizens have sometimes demonstrated in their willingness to serve on juries.[96] Many people go to great lengths to avoid doing their civic duty, and others make excuses to avoid participation. [97] Some trial judges have even ordered incarceration for those who have been reluctant to report when called to serve.[98] Such behavior has been attributed to a lack of respect for the importance of the jury as an institution.[99] Others say it is a result of how we have treated jurors over the years. For example, some studies have indicated that serving is a financial hardship because of the low wage that is offered.[100] Problems have also been attributed to the unpredictable length of

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94. "[T]he effect of racial composition on a jury and its verdict is most noticeable when the trial involves a blatantly racial issue." HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 5 (1993).

95. Demographic perspectives play a major role in the jury selection process. The role that these attitudes play is reflected in the comments of one prosecutor's observations about jury selection:

> Some believe that members of the venire with a Nordic background are highly practical, Mediterraneans are thought to be emotional, elderly people are considered more forgiving, and social workers . . . [have] a real or imagined predisposition to rehabilitation rather than punishment . . . . Along these lines, some people have theorized that African Americans may not be good prospective jurors in a capital case because they have historically been persecuted as a race and would therefore sympathize with the prosecuted defendant. In addition, some believe that many blacks have probably been the victims of, or observed, rough treatment in their neighborhoods by the police and that accordingly they would resent police officers regardless of the merits of the case.

Ronald J. Sievert, *Capital Murder: A Prosecutor's Personal Observations on the Prosecution of Capital Cases*, 27 AM. J. CRIM. L. 105, 110 (1999).

96. Only about 45 percent of Americans who are sent jury notices actually appear at the courthouse. *See* STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 220 (1994).

97. Unfortunately, many people view jury service with disdain and put it "in a class with measles and root canal work. Quite often, intelligent, successful people who would make good jurors are the ones who get out of serving." F. LEE BAILEY & HARVEY ARONSON, THE DEFENSE NEVER RESTS 257 (1971).

98. A few judges have imposed incarceration for persons who have avoided jury duty. *See* Dennis O'Brien, *Two No-Shows for Jury Duty Have Day in Court*, BALT. SUN, June 26, 1998, at 3B.

99. *See* BAILEY & ARONSON, *supra* note 97, at 257.

100. Most states only pay a modest amount per day for jurors who serve. One recent report has supported that employees should compensate jurors during their term of service. See MARYLAND COUNCIL ON JURY USE AND MANAGEMENT: REPORT AND RECOMMENDATIONS 3 (Apr. 2000) [hereinafter MARYLAND JURY REFORM REPORT].

service depending on the circumstances of the trial.[101] Lack of participation has even attributed it to the process of strange rules and control which limit jurors from talking about the case during the trial,[102] and the rules that keep large parts of the trial a mystery to them.[103] With so many controversies, suggestions that we should abandon its use in the United States recur; consequently, some modifications are obviously needed, but examining which reforms make the most sense requires some restraint in proposing change.[104]

IV. THE MODEL PENAL CODE AND CONTROL OF JURY DISCRETION

In an effort to control juries in the death penalty process from making arbitrary decisions, the American Law Institute (ALI) made several proposals at its May, 1959, meeting in the form of tentative drafts on the subject of capital punishment.[105] The ALI took no position on the appropriateness of the death penalty;[106] instead, it recognized that "the death penalty ranked high among issues of public controversy in the criminal law."[107] The drafters explained:

> [T]he Reporters favored abolition of the capital sanction. The Advisory Committee recommended by a vote of 17-3 that the Institute express itself upon the issue . . . . The Council was divided on the issue of retention or abolition but substantially united in the view that the Institute could not be influential in its resolution and therefore should not take a position either way.[108]

The drafters believed that "[i]t was clear . . . that many jurisdictions would retain the sentence of death for some forms of murder for many years[.]"[109] Thus, it was essential that the ALI address at least two essential problems.[110] "[F]irst, in what cases should capital punishment be possible; and second, what agency and what procedure should determine whether the

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101. Proposals for one-day/one-trial systems have been implemented with some success as a way to encourage citizen participation. *See Developments in the Law–The Civil Jury*, 110 HARV. L. REV. 1408, 1455-56 (1997).

102. *See* MARYLAND JURY REFORM REPORT, *supra* note 100, at 8.

103. *See* Anderson, *supra* note 93, at 397.

104. For a discussion of major proposed reforms to the jury system, see Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1176-94 (1995).

105. *See* MODEL PENAL CODE § 210.6 note on history of section (1980).

106. *See id.*

107. *Id.* at cmt. 1.

108. *Id.*

109. *Id.*

110. *See id.*

sentence of death should be imposed."[111]

The wisdom in the ALI's judgment on this point cannot be overstated. Because of the philosophical differences that abound regarding capital punishment,[112] the legal processes by which it might be imposed are varied. The need for some guiding model to assist those jurisdictions that might elect capital punishment was obviously essential. Particularly, in a legal and structural, rather than a political or emotional, perspective.[113] In order to make it clear that the attempt to develop a suitable decision making framework for capital decisions would not be misunderstood, the ALI emphasized its cautionary tone: "[i]t bears repeating, however, that inclusion of this provision in the Model Code does not signal Institute endorsement of capital punishment, nor does the optional authorization of this penalty under the statute reflect an Institute decision in favor of abolition." [114]

An influential study prepared for the ALI by Professor Thorsten Sellin, determining that "executions have no discernible effect on homicide death rates[,]"[115] was also considered by the Model Penal Code drafters. Subsequent research also supported this conclusion,[116] while other more controversial research attempted to demonstrate the possibility of a deterrent effect.[117] The efficiency of the death penalty as a deterrent, however, was clearly a secondary concern for the ALI. The drafters pointed out that, "[a] trial where life is at stake becomes inevitably a morbid and sensational affair, fraught with risk that public sympathy will be aroused for the defendant without reference to guilt or innocence of the crime charged."[118]

Seeking a structural resolution of how best to approach the problem of drafting a death penalty statute, the drafters observed that "it is obvious that capital punishment is the most difficult of sanctions to administer with even rough equality. A rigid legislative definition of capital murders has proved

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111. MODEL PENAL CODE § 210.6 cmt. 1 (1980).

112. *See generally* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES (Hugo Adam Bedau ed., 1997) (discussing capital punishment philosophies).

113. Capital punishment has often been related to the emotionally charged image of American politicians who like to maintain that they are tough on crime. "There is an overwhelming desire for Americans to demonstrate that they are very tough people. The death penalty is a symbolic demonstration of toughness." IAN GRAY & MOIRA STANLEY, A PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY 299 (1989).

114. MODEL PENAL CODE § 210.6 cmt.1 (1980).

115. *Id.* at cmt. 2 (quoting T. SELLIN, THE DEATH PENALTY 34 (1959)).

116. For a discussion concerning of the efficacy of the death penalty as a deterrent, see Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981).

117. *See generally* Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

118. MODEL PENAL CODE § 210.6 cmt. 2 (1980).

unworkable in practice, given the infinite variety of homicides and possible mitigating factors."[119] Focusing on the most critical concern of any decision making system, the control of discretion, the drafters explained that because of the nature of how the death penalty is imposed "[a] discretionary system . . . becomes inevitable, with equally inevitable differences in judgment depending on the individuals involved and other accidents of time and place. Yet most dramatically when life is at stake, equality is, as it is generally felt to be, a most important element of justice."[120] Recognizing that the penalty would continue to be sought in many states, the drafters advised that "[t]hose jurisdictions that elect to retain the penalty must confront the special need to provide a fair and rational system of administration and to meet recently developed constitutional standards."[121]

The ALI totally rejected any notion that the death penalty should be imposed for any crime other than murder.[122] The exclusion of non-homicide crimes was primarily motivated by the unequal exercise of discretion in rape prosecutions toward Blacks, which was considered by the ALI to be "distinctly unsettling."[123] The disparity of Black executions for rape which reflected a disparity of 366 out of 409 total executions was considered "too suggestive to ignore[.]"[124] The exclusion of all crimes except murder reflects the continuing theme of seeking controlled discretion in capital cases. "Discretion always includes the possibility of abuse, and discretion that is neither disciplined nor informed by intelligible standards is all the more likely to be exercised on unacceptable bases."[125]

V. THE 1970'S: REFLECTION AND RETRENCHMENT, *FURMAN*, *GREGG*, AND *LOCKETT*

In *Furman v. Georgia*,[126] the Supreme Court found that all existing punishment schemes violated the Eighth Amendment. While *Furman* did not hold that the death penalty was per se unconstitutional, it did recognize that the penalty was "differ[ent] from all other forms of criminal punishment, not in degree but in kind."[127] The Supreme Court opinion in *Furman* produced a multiple set of concurring opinions in which the death penalty was examined

119. *Id.*
120. *Id.*
121. *Id.*
122. *See id.* at cmt. 3.
123. *Id.*
124. MODEL PENAL CODE § 210.6 cmt. 3 (1980).
125. *Id.* at cmt. 4.
126. 408 U.S. 238 (1972).
127. *Id.* at 306 (Stewart, J., concurring).

for how it was then being applied around the country.[128] The principle theme that achieved a consensus with the Court was that even if the punishment could be constitutionally applied, it should not be applied in a manner that is unguided, standardless, inconsistent, or unfair.[129]

Furman was a surprising opinion considering that *McGautha*, decided one year earlier,[130] gave little foreshadowing that such a sweeping opinion would come from the Court. It may be that the debate generated in the discussions in both opinions are the clearest explanation of why the Court has had such a struggle determining which controls over jury discretion are necessary and which are not.[131] Courts had always been comfortable granting judges broad sentencing discretion,[132] but guiding juries through the mysteries of deliberations was no doubt a difficult challenge to comprehend and from which to fashion a jurisprudence.[133]

The greatest value of *Furman* was that it represented a clear contemplation and reflection by the Supreme Court to consider a complete structural change in its jurisprudence. Like it had done almost two decades before in *Brown v. Board of Education*[134] and a decade earlier in *Gideon v. Wainwright*,[135] the Court took on the responsibility to begin the process of supervising a constitutional system that had demonstrated obvious and longstanding flaws.[136] After *Furman*, the Court had a four year break from issuing opinions in capital cases while the states rushed to replace their invalidated death penalty schemes.[137]

The states struck back when they began prosecuting death penalty cases under new statutes they believed were constitutionally acceptable.[138] Many

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128. *Id.* at 240-374.

129. *See id.*

130. McGautha v. California, 402 U.S. 183 (1971).

131. After *Furman* was decided there was much speculation about what type of statute would meet constitutional standards.

132. *See* Williams v. New York, 337 U.S. 241, 244-45 (1949) (recognizing that sentencing judges have broad discretion as to the types and sources of information they can consider).

133. *See, e.g.*, Kordenbrock v. Scroggy, 919 F.2d 1091, 1109-10 (6th Cir. 1990) (vacating a sentence because substantial possibility existed that the jury was misled by lack of instruction regarding mitigating factors).

134. 347 U.S. 483 (1954).

135. 372 U.S. 335 (1963).

136. Both *Brown* and *Gideon* were followed by major undertakings at the state level which brought about structural changes in the way the legal system operated.

137. *See infra* note 139 (many states renewed the penalty).

138. One commentator has suggested that the *Furman* decision may have encouraged the States to advance new death penalty statutes.

> The Supreme Court told them in the *Furman* decision that perhaps there were classes of cases for which the supreme penalty might be exacted provided that the standards for the

were based on the Model Penal Code formulation developed in the late 1950's.[139] Among those statutes was the one developed by the State of Georgia that was reviewed by the Supreme Court in *Gregg v. Georgia*.[140]

Gregg was the first in a trilogy of cases decided on the same day which upheld state death penalty sentencing schemes. The other cases were *Proffitt v. Florida*[141] and *Jurek v. Texas*,[142] which also upheld death penalty statutes in their respective states.[143] In *Gregg*, the Supreme Court said that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[144]

The Supreme Court held that the Georgia capital punishment statute was not unconstitutional because, among other things, it provided adequate procedural safeguards to prevent the jury from considering issues in a manner that was unfairly prejudicial to the accused.[145] The Court pointed out that "bifurcation"[146] of the capital sentencing hearing was the primary safeguard needed to prevent the jury from misusing the information they had been given.[147] Bifurcation prevents particularly prejudicial information from being

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> death sentence were carefully drawn and the penalty was not applied in an arbitrary and discriminatory manner. The legislators responded .... They sought to classify certain acts as justifying capital punishment.

FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 31 (1978).

139. MODEL PENAL CODE § 210.6 (1980).

140. 428 U.S. 153 (1976).

141. 428 U.S. 242 (1976).

142. 428 U.S. 262 (1976).

143. *Id.* at 276; *Proffitt*, 428 U.S. at 259-60.

144. *Gregg*, 428 U.S. at 189 (opinion of Justices Stewart, Powell, and Stevens).

145. *See id.* at 206-07.

146. The concept of bifurcation has been favored in directing the discretion of the jury in complex cases. Its practical effect is to separate the legal and factual issues in the case so that the jury does not become confused or prejudiced against the capital defendant before making appropriate decisions.

> In bifurcated trials, only the evidence and testimony relevant to each segment [of the trial] is presented to the jury for its decision before moving forward to the next segment, if necessary.... Empirical studies suggest that the use of bifurcated trials ... can improve overall juror comprehension or provide a practical roadmap for jurors during their deliberations ....

Paula L. Hannaford et al., *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247, 259-60 (1998).

147. It is not an accident that the instructions to jurors are sometimes vague, incomplete, and difficult to understand. In fact, there is a cliché that jurors frequently set aside these instructions and decide the case on the merits according to the dictates of their consciences and not according to written statutory law.

heard.[148] The potential to have the jury make a guilty determination of a defendant after hearing information relevant to sentencing was consistent with the approach advanced by the ALI in the Model Penal Code drafts.[149] The use of a bifurcated procedure ultimately became considered among the most important tools for guiding discretion.[150] For example, to permit the jury to hear about the defendant's criminal background would deny him the fair trial to which he was entitled. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees."[151]

The procedural protection offered in *Gregg* was designed to prevent the death penalty from becoming "wanton[]," "freakish[]" and as arbitrary as being "struck by lightening."[152] The Supreme Court has cautioned that any decision to impose the death penalty should be based on reason rather than emotion or caprice.[153] Separating the death penalty trial into two phases emphasized the notion that juries need to be controlled regarding particularly inflammatory information. Although it may be that most people consider the guilt/innocence determination to be the most important finding, the penalty phase is entitled to constitutionally mandated procedural protection. "[F]undamental principles of procedural fairness apply with no less force at the penalty phase of a . . . capital case than they do in the guilt-determining phase of any criminal trial."[154]

Gregg also directed that capital punishment statutes should list aggravating and mitigating circumstances to direct the sentencing juries discretion.[155] The defendant would not be subject to the death penalty unless the jury found that he met one of the aggravating circumstances.[156] The jury would then balance the aggravating circumstances against the mitigating circumstances in order to determine whether death or some other sentence

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Joseph B. Kadane, *Sausages and the Law: Juror Decisions in the Much Larger Justice System*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JURY DECISION MAKING 229 (Reid Hastie ed., 1986).

148. Potentially prejudicial material like victim impact information is an example of evidence that may inflame the passion of a sentencing jury. *See* Joan M. Shaughnessy, Booth v. Maryland, *Insight into the Contemporary Challenges to Judging*, 49 WASH. & LEE L. REV. 279, 285 (1992) (noting that courts are utterly unequipped to manage the "uses and dangers of emotion in judging").

149. MODEL PENAL CODE § 210.6 cmt. 2 (1980).

150. *See* Hannaford, *supra* note 147, at 259-60.

151. Estelle v. Smith, 451 U.S. 454, 463 (1981).

152. Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

153. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977).

154. Presnell v. Georgia, 439 U.S. 14, 16 (1978).

155. Gregg v. Georgia, 428 U.S. 153, 193-95 (1976).

156. *See id.* The Supreme Court has ruled that a jury need not be required to specify particular aggravating factors that permit a death sentence. *See* Hildwin v. Florida, 490 U.S. 638, 640-41 (1989).

would be appropriate.[157] This process would take place after the jury found the defendant guilty of the given murder charge beyond a reasonable doubt.[158] At the sentencing phase, however, the burdens of proof for weighing and balancing need not be established beyond a reasonable doubt in order to uphold a capital sentence.[159]

It was also required that state death sentences be subject to automatic state appellate review.[160] The reason for this requirement is obvious. Without the possibility that the discretion of the jury be subject to automatic appeal, it would be easy to revert to a system of summary justice that prevailed in many states.[161] *Gregg* set the framework for how death penalty cases would be prosecuted and defended for decades to come; furthermore, attacks on death verdicts would be framed in the context of the aggravation/mitigation categories,[162] and challenges to evidence,[163] jury instructions,[164] and conduct of counsel[165] would be forever linked to its structure.

Later in the decade the Court issued another pro-defendant ruling in *Lockett v. Ohio*,[166] where a state statute that did not permit giving independent

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157. Some scholars suggest that requiring juries to balance at all is an insurmountable task. "The sentencing authority's *attention* may be guided and channelled, but its *discretion* remains unguided and uncontrolled if aggravating and mitigating circumstances are present." ZIMRING & HAWKINS, *supra* note 30, at 87.

158. The term "reasonable doubt" has been described as an "almost heroic commitment to decency," which sometimes permits the guilty to go free. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 189 (1966).

159. Some writers have suggested that "'capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.'" ROGER HOOD, THE DEATH PENALTY: A WORLD WIDE PERSPECTIVE 67 (1989).

160. *See generally* Zant v. Stephens, 462 U.S. 862, 874-80 (1983).

161. A recent report calculated that currently the national average of the time it takes from the initial trial to execution in capital cases is about 10.6 years. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 3 (2000) (cited in Fox Butterfield, *Death Sentences Being Overturned in 203 Appeals*, N.Y. TIMES, June 12, 2000, at A1.

162. The essence of mitigation is the notion that "[e]xcept, possibly, in the rarest kind of capital case, a capital defendant could never be sentenced to death solely on the basis of the crime committed." WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 7 (1991).

163. Capital litigation involves a constant effort to "object to inadmissible evidence proffered by the prosecutor." AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 135 (1989).

164. *See* Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (making multiple challenges to the death sentence, including prejudicial jury instructions).

165. *Cf.* Lawson v. Dixon, 3 F.3d 743, 755 (4th Cir. 1993) (exhibiting how prosecutors appeal to jurors by stating that, "in other countries, after being convicted of first-degree murder, authorities would bring a rope and hang the defendant summarily[,]" and this was not reversible error).

166. 438 U.S. 586 (1978).

consideration to mitigating factors was considered unconstitutional.[167] *Lockett* opened the door to the use of a wide variety of information about the defendant's background and history in order to urge a jury not to render a death sentence.[168] In the opinion, the Court made clear that structural limitations on the consideration of mitigating evidence would be disfavored.[169] Indeed, as the decade ended the Court reinforced its ruling in *Lockett* with its decision in *Green v. Georgia*,[170] where it was held that exclusion of reliable hearsay evidence of mitigation relevant to punishment from the penalty phase of a trial violated due process.[171] The scope of the *Green* opinion ushered in an era of social science and social background testimony rarely known to jury trials in other types of cases.[172]

As the 1970's concluded, there was something for both death penalty opponents and advocates. The punishment had been halted for a time, and where it was reinstated new statutes greatly restricted its use, making it more difficult to pursue because of a host of new and unfamiliar procedural rules.[173] For the death penalty proponent, the availability of the punishment itself had retained its popularity and returned with a vengeance, given the sanction of the *Gregg* trilogy and its guidelines to follow in drafting constitutional statutes.[174]

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167. The requirement that death be imposed only on a person who has been considered as an individual, in all her uniqueness, reached its zenith in *Lockett v. Ohio*. *Lockett* recognized the Eighth Amendment right of a capital defendant to have the decisionmaker hear individualized circumstances of the defendant's life and crime that might provide a reason to let her live.

Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1367-68.

168. *Lockett*, 438 U.S. at 607-09.

169. One commentator has described the Supreme Court's rulings on mitigating evidence in the years immediately after *Lockett* as striking down "any limitations on the kinds of mitigating evidence a defendant might present to the sentencer[.]" ROBERT A. BURT, THE CONSTITUTION ON CONFLICT 338 (1992).

170. 442 U.S. 95 (1979).

171. *Id.* at 97.

172. After *Lockett* it became a common practice to use social workers to present mitigation evidence. Other types of hearsay evidence was also sanctioned by the Supreme Court. *See, e.g.*, Jackson v. Herring, 42 F.3d 1350, 1362-70 (11th Cir. 1995) (discussing broad use of mitigating evidence in death penalty cases).

173. Many creative legal challenges to death sentences came about as a result of the new Supreme Court decisions. *See, e.g.*, Hendricks v. Calderon, 70 F.3d 1032, 1043-45 (9th Cir. 1995) (discussing use of multiple mitigation theories).

174. After *Furman*, states drafted new death penalty statutes. "These statutes have been subjected to critical scrutiny by many legal scholars, most of whom have concluded that they 'represent only a modest advance towards formality over the old pre-Furman statute(s).'" HOOD, *supra* note 159, at 153.

VI. THE 1980'S: BEYOND MITIGATION, *MCCLESKEY*, *CALDWELL*, AND *MILLS*

With only a few years of experience and local precedent with the new state statutes, the 1980's brought a host of new cases that helped to define the contours of the newly fashioned guided discretion statutes. The Court began the decade with three victories for defendants seeking to control jury power over death sentences. In *Godfrey v. Georgia*,[175] the Court struck down the Georgia Supreme Court's interpretation of an aggravating factor describing a crime as "'outrageously or wantonly vile, horrible, and inhuman'" as unconstitutionally vague.[176]

In *Beck v. Alabama*,[177] the Court invalidated a statute that precluded the sentencing jury from considering lesser included offenses.[178] The Court observed that a statute imposing such limitations impermissibly skewed the fact finding process and thus violated constitutional standards.[179] In 1981, the Court added the additional constitutional protection that double jeopardy prevented a death sentence to be the subject of retrial after a life sentence was received at the first trial.[180]

In the celebrated *Adams v. Texas* case,[181] the Court held that exclusion from a capital jury of those persons unable to swear that the possibility of the death penalty would not effect their verdict was unconstitutional.[182] Implicit in its decision was the recognition that the attitudes of individual jurors who might give a strong presumption that the death penalty is inappropriate in all but the strongest cases was worthy of protecting.[183]

Later in the decade, however, the Court retreated from the *Adams* holding in *Wainwright v. Witt*,[184] when it determined that prospective jurors whose views on capital punishment would prevent or substantially impair the performance of their duty in a capital case could be excluded.[185] The Court concluded that the jurors' views need not be established with unmistakable clarity, and the federal court accorded a presumption of correctness to the trial court's determination to exclude the juror for cause.[186]

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175. 446 U.S. 420 (1980).
176. *Id.* at 428-32.
177. 447 U.S. 625 (1980).
178. *Id.* at 644-46
179. *See id.* at 642.
180. *See* Bullington v. Missouri, 451 U.S. 430, 446 (1981).
181. 448 U.S. 38 (1980). The *Adams* case became the subject of the book and movie, *The Thin Blue Line*.
182. *Id.* at 40.
183. *See id.* at 45.
184. 469 U.S. 412 (1985).
185. *Id.* at 424.
186. *See id.* at 424, 426-29. For a discussion of jury system dismissal for cause, see J. Clark Kelso,

The Supreme Court has gone so far as to hold that a death sentence must be vacated if it is possible that the jury may have improperly delegated some of the responsibility for rendering the death sentence to another part of the criminal justice system. In *Caldwell v. Mississippi*,[187] it was held that a prosecutor's argument that death penalty cases are reviewed by the State Supreme Court made their findings invalid.[188] The Court likely believed the jury would be unable to manage the information about the prospects of an appeal as they considered other information in *Caldwell's* case. The Court feared that the jury would be tempted to rely too heavily on the work of some other entity thereby diminishing their sense of responsibility for the outcome of the case.[189] The rationale of *Caldwell* reflects the important concern that jurors, unfamiliar with the complicated death penalty process, should be protected from distractions that might lead them to render a death sentence too easily.[190] The prosecutor's argument encouraged their speculation about a future they could not possibly predict.

Later in the decade, the Supreme Court considered whether a jury should be permitted to issue a death decision without adequate guidance from the sentencing forms used by the state. In *Mills v. Maryland*, the Supreme Court held that the sentencing form used by the Maryland court confused the jury to such an extent that it was possible that an unintended death sentence could be rendered by using it.[191] The Court embraced the logic of the Maryland appellate court's dissenting judge who reasoned that under the form, if the jurors all thought the defendant's life should be spared but could not agree on a reason, a death sentence might be viewed as necessary because of the confusing form.[192] *Mills* was the first case that focused on the mechanics of

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Final Report of the Blue Ribbon Commission on Jury System Improvement, 47 HASTINGS L.J. 1433, 1480-83 (1996).

187. 472 U.S. 320 (1985).

188. *Id.* at 325-26, 328-30.

189. *See id.* at 325-26, 341.

> Psychological traits and attitudes may predict juror verdicts because jurors rely upon cognitive and emotional cues or assumptions to make decisions. To understand this process, one must understand the unique aspects of being a juror. For most people, participation on a jury requires them not only to process more information than usual, much of which may be unfamiliar, but also to make a decision that has serious consequences.

Michael Owen Miller & Thomas A. Mauet, *The Psychology of Jury Persuasion*, 22 AM. J. TRIAL ADVOC. 549, 554 (1999).

190. "The tremendous importance of educating capital jurors on the nature of their task, as well as the constitutional nature of this mandate, would lead one to expect that in the death penalty area these studies on jury comprehension would fall on especially fertile soil." Tiersma, *supra* note 28, at 49.

191. 486 U.S. 367, 382-84 (1988).

192. *See* Mills v. State, 527 A.2d 3, 23 (Md. Ct. App. 1987). Judge McAuliffe stated:

a form used in a death penalty case.[193] It resulted in several death sentences being overturned in Maryland, and the institution of an emergency rule change to correct the form.[194] Focus on the actual tools of deliberation, like the verdict forms and work sheets, may ultimately become an important part of death penalty litigation. Since the forms are essentially of equal character as jury instructions, it is appropriate that they receive the same constitutional scrutiny.[195]

The petitioner is entitled to have his sentence set by a jury that is properly instructed.[196] There can be no presumption that the jury understood the charge in a constitutional manner.[197] When there "exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law . . . that verdict must be set aside."[198] Although *Mills* recognized that jury instructions and jury forms go together, its four dissenting justices expressed grave concerns about whether its protection might be short lived.[199]

Without a doubt the most important death penalty case of the decade was *McCleskey v. Kemp*, which held in a narrow 5-4 decision that Georgia's death penalty was not unconstitutionally discriminatory. [200] A holding in favor of *McCleskey*, in all likelihood, would have ended the death penalty in America.[201] The issue in the case reflected the long standing controversy of

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> [I]t is probable, or at least reasonably possible, that . . . [the] jury understood the language . . . [as meaning] that the answers of "no" given on the sentencing form represented their failure to unanimously find the existence of a circumstance, rather than a unanimous determination that the circumstance did not exist. . . . [I]f I am correct, it means that the procedure followed in this case impermissibly and unconstitutionally precluded the ultimate consideration of mitigating factors that may have been proven.

Id.

193. *See* Amy Goldstein & Paul Dugan, *Supreme Court Virtually Halts Death Penalty in Maryland*, WASH. POST, June 9, 1988, at D1.

194. *See id.*

195. "As the jury is being asked to apply ever more complex rules to complicated fact patterns, proper communication is increasingly essential. And nowhere is this more critical than when a person's life hangs in the balance." Tiersma, *supra* note 28, at 49.

196. *See* Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980).

197. *See id.*

198. Francis v. Franklin, 471 U.S. 307, 323 n.8 (1985).

199. After *Mills* was decided, other states were effected by its holding. *See, e.g.*, State v. McKoy, 372 S.E.2d 12 (N.C. 1988)

200. 481 U.S. 279, 308-13 (1987).

201. The long history of racial discrimination in capital punishment strongly suggests that the only workable approach to the problem, if we acknowledge discrimination which cannot be removed, may be that entire punishment may need to be eliminated.

One example of the structural racial inequality in the punishment is reflected in the policies of states like South Carolina prior to 1833, that provided no right to a jury trial or appeal from a capital offense. *See* HIGGINBOTHAM, *supra* note 33, at 180.

explaining why there is such a disproportionate racial impact.[202] That controversy is part of a recent and somewhat surprising trend to re-examine capital punishment in America.[203]

Recently, the American Bar Association called for a moratorium on capital punishment.[204] Early in 2000, the Republican Governor of Illinois issued a moratorium on executions in his state because of the disturbing finding that several persons on death row were innocent of the crimes for which they were charged.[205] These facts came to light as a result of the availability of DNA evidence or revelations of police or prosecutorial discovery abuses.[206] Efforts to prevent someone who is not the perpetrator of a crime from being executed is obviously a primary concern of a reliable justice system. Putting an innocent person to death does not aid the victims in their healing process, the jurors who render the verdict, or the public that still seems to strongly support capital punishment because on this point few would disagree.[207]

The prospect of eliminating unexplained racial disparity, however, is a more challenging question.[208] The Supreme Court struggled with this question

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202. For an insightful examination of racial disparity on death row, see Stephen L. Carter, Comment, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 439-43 (1988) (suggesting that jurors are influenced by both the race of the victim and the defendant in death penalty cases).

203. Nebraska L.B. 76, which initially proposed abolition of the death penalty, was amended to propose a moratorium on the penalty until 2002, pending a study of all homicides in the state since 1973; however, the bill was unsuccessful. *See* H.R. 76, 96th Leg., 1st Reg. Sess. (Neb. 1999).

204. The organization "has officially called for a state-by-state moratorium on capital punishment until each adopts policies intended to 'ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and . . . minimize the risk that innocent persons may be executed.'" Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Deriyed From Panel Data*, 60 U. PITT. L. REV. 321, 323 (1999) (quoting *ABA House of Delegates Recommendation of February 3, 1997* (visited Nov. 22, 1998) <http://www.soci.niu.edu/~ critcrim/dp/dp-aba>).

205. *See* Wendy Cole, *Death Takes A Holiday; Illinois Halts Executions While Reviewing Mistakes*, TIME, Feb. 14, 2000, at 68 (discussing the death penalty moratorium decision ordered by Illinois Governor George Ryan in light of 14 death row inmates being exonerated since 1987).

206. Even one death penalty prosecutor has acknowledged that "[t]he once-evolving, and now (almost) unassailable, scientific technique of DNA profiling has served not only to convict many defendants but also to provide the defense bar with the most compelling evidence possible that a few defendants have in fact been wrongly convicted." Gwynn X. Kinsey, Jr., *Post-Trial Claims of "Actual Innocence"*, MD. B.J., Nov-Dec. 1995, at 15.

207. Most Americans support capital punishment in some form. A Newsweek poll reported that only about 17% of people opposed the death penalty in all cases. *See* Tom Morganthau, *Condemned to Life*, NEWSWEEK, Aug. 7, 1995, at 19, 22.

208. *See* David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359 (1994) (discussing the possibility of removing discrimination from capital jury sentencing).

in *McCleskey*.[209] McCleskey's arguments presented strong statistical evidence suggesting racial bias.[210] Research presented to the Court by Professor David Baldus of the University of Iowa indicated that the chances of an African American receiving the death penalty increases many times over when the victim is white.[211] These statistical disparities, although acknowledged by the Supreme Court, were not sufficient to lead it to invalidate the *McCleskey* sentence.[212] Without contradicting the data, the majority rejected the equal protection arguments.[213]

Ironically, two justices who were on the Supreme Court and voted against the racial bias claim later renounced their positions. Justice Lewis Powell, the author of the *McCleskey* opinion, told a biographer after his retirement from the Court that he regretted his decision in *McCleskey*, and he had "come to believe capital punishment should be abolished."[214] Justice Powell's comments are particularly noteworthy considering that he chaired a federal death penalty commission that resulted in legislation designed to speed up executions and limit federal review.[215]

Another member of the Court who altered his position on capital punishment was Justice Harry Blackmun who wrote in one of his final dissenting opinions that, "I no longer shall tinker with the machinery of death."[216] Noting, among other things, that the penalty was hopelessly entangled with questions of potential racial bias, he concluded that he "feel[s] morally and intellectually obligated simply to concede that the death penalty experiment has failed."[217] He lamented that "no combination of procedural

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209. *See generally* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 66 (1993) (arguing that the influence of jury discrimination can be measured).

210. *See generally* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

211. While unexplainable yet obvious racial disparity of jury verdicts in death penalty cases are examined, it is often assumed that black jurors would favor black defendants automatically. Professor Derrick Bell has written that there is *"a widespread assumption that blacks, unlike whites, cannot be objective on racial issues and will favor their own no matter what. This deep-seated belief fuels a continuing effort . . . to keep black people off juries in cases involving race."* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 113 (1992).

212. McClesky v. Kemp, 481 U.S. 279, 312-13 (1987).

213. *See id.*

214. JOHN C. JEFFRIES, JR., JUSTICE LEWIS POWELL JR. AND THE ERA OF JUDICIAL BALANCE 451-52 (1994).

215. The Powell Report on Federal Habeas Corpus became the most influential document in Congress' effort to speed up capital punishment. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Judicial Conference of the United States Committee Report (Sept. 27, 1989), *reprinted in* 45 CRIM. L. REP. 3239, 3242 (1989).

216. Callins v. Collins, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting).

217. *Id.*

rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."[218] He characterized the Court's attempts to fairly regulate the death penalty as a "delusion."[219] Justice Blackmun retired from the Court shortly after these comments.[220]

Citing the very statistics from *McCleskey*, Justice Blackmun noted that the evidence of racial prejudice was "staggering."[221] The unrefuted study demonstrated that Blacks who killed whites were sentenced to death "at nearly *22 times* the rate of blacks who kill blacks."[222] Other studies have reached similar conclusions. For example, one Louisiana study found that although ninety percent of all homicide victims in New Orleans are black, seventy-five percent of the inmates on death row are there for murdering whites.[223] There have been calls to implement federal legislation to address the problem, and death penalty opponents and some clergy have called for an end to execution, citing the prospect of racial discrimination as a serious concern.[224]

Several studies have concluded that an examination of the racial implications should be more closely examined.[225] Governor Glendening of Maryland has placed funding in his executive budget to fund such a study,[226] and, like others, has suggested that the death penalty be placed on moratorium

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218. *Id.*

219. *Id.*

220. Justice Blackmun retired at the conclusion of the 1994 term. One insightful commentator noted that "Justice Blackmun correctly asserted that the death penalty has been deregulated. In recent years, the Supreme Court has demonstrated a willingness to completely overlook unfair procedures in death penalty cases." Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677, 677 (2000).

> [T]he Supreme Court and Congress have placed restrictions on the filing of writs of habeas corpus, created the harmless error rule, and established the non-retroactivity doctrine, all of which prevent death row inmates from obtaining relief.... [T]hrough the creation of a death penalty friendly doctrine and manipulation of that doctrine, or by ignoring and refusing to address certain important issues, such as racial discrimination in the imposition of the death penalty–[the Supreme Court] upholds the death penalty at all costs.

Id. at 678.

221. *Callins*, 114 S. Ct. at 1135.

222. *Id.* (quoting McCleskey v. Kemp, 481 U.S. 279, 327 (1987)).

223. See SISTER HELEN PREJEAN, DEAD MAN WALKING 43-44 (1993).

224. Federal legislation like the Racial Justice Act (H.R. 4017) intended to amend Title 28 of the United States Code to prevent racial discrimination in capital sentencing have been debated in Congress.

225. *See* U.S. GEN. ACCOUNTING OFFICE, DEATH SENTENCING: RESEARCH INDICATES PATTERNS OF RACIAL DISCRIMINATION 5 (1990) (reviewing 28 empirical studies of the death penalty, and in 82% of them the victim's race influenced the verdict).

226. *See* Paul Schwartzman, *Glendening Proposes Study of Executions; Penalty's Fairness to be Examined*, WASH. POST, Feb. 9, 2000, at B2 (discussing the governor setting aside $225,000 to fund the study of potential racial bias in the death penalty).

until the racial questions are resolved.[227] Although further delays in the capital punishment process will likely anger death penalty proponents and add to the understandable frustration of some surviving family victims, a pause in actual executions seems appropriate considering the irrevocability of the punishment until the racial issue can be addressed.[228]

VII. THE 1990'S: *PAYNE* AND POLITICS

When the Supreme Court decided that it was unconstitutional to admit victim impact evidence in a capital jury trial in *Booth v. Maryland*, [229] who could have known the tangled path of jurisprudence the case would spawn until it was finally overruled in 1991 by *Payne v. Tennessee*?[230] Although litigants wanted to attack the precedent in *Booth*, they failed at the end of the 1980's in *Mills v. Maryland*[231] and *South Carolina v. Gathers*,[232] where the issue was raised within about a year after the precedent had been set.[233] The political implications of *Payne* have ranged from the case being heralded by victims rights groups as a victory[234] that restored confidence in the criminal justice system to being credited with hastening the retirement of liberal Justice Thurgood Marshall.[235] To say that the *Payne* decision represents the greatest

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227. The Maryland legislature recently entertained a moratorium that would have delayed all executions until a study could be completed to determine if the death penalty was being imposed in a racially discriminatory way. *See* H.R. 388, 414th Reg. Sess. (Md. 2000).

228. Under the more recent federal death penalty, the same type of racial disparity which has occurred in state prosecutions has begun to emerge. Since the federal penalty was revived in 1988, and until 1994, 89 percent of those on which the penalty has been sought are either Black or Hispanic. *See* Kenneth J. Cooper, *Racial Disparity Seen in U.S. Death Penalty; Execution Under 'Kingpin' Law Sought Mostly for Blacks, Hispanics*, WASH. POST, March 16, 1994, at A5.

229. 482 U.S. 496 (1987).

230. 501 U.S. 808 (1991).

231. 486 U.S. 367 (1988).

232. 490 U.S. 805 (1989).

233. Interestingly, the Supreme Court granted review of the victim impact issue in *Booth, Mills*, and *Gathers*, but in *Payne*, the Supreme Court requested that the issue be briefed although it had not been raised by either party. The Court had also granted but later dismissed the victim impact issue in an Ohio case just prior to its granting the issue in *Payne*. *See* State v. Huertas, 553 N.E.2d 1058 (Ohio 1990), *cert. granted*, 498 U.S. 957 (1990), *cert. dismissed as improvidently granted*, 498 U.S. 336 (1991). Thus, in the period between 1986-1991 the Court granted certiorari on the issue five times.

234. Victims rights groups complained about the Supreme Court's exclusion of victim impact evidence from the time that opinion was announced. *See generally* Paul Boudreaux, Booth v. Maryland *and the Individual Vengeance Rationale for Criminal Punishment*, 80 J.CRIM. L. & CRIMINOLOGY 177 (1989).

235. Justice Marshall announced his retirement the day *Payne* was decided. One writer reported that the decision left the Court angry and divided, and Justice Marshall bitter. *See* SAVAGE, *supra* note 17, at 418-20. Another writer reported that during the months prior to the *Payne* decision the tone of the Court was "rancor[ous]" and that there was "blood on the conference room floor[.]" CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 403 (1993). The staff of

threat to guided discretion of all Supreme Court cases since *Furman* is no exaggeration.[236] The opinion raises great uncertainties about defining the range of persons who might be defined as victims,[237] the scope of their potential testimony, and the degree of its emotional content.[238] The case raises serious confrontation clause problems[239] as well as strategic concerns about the testimony that can be challenged.[240] Most importantly, considering the questions raised in *McCleskey* about weighing the value of victim's testimony according to race, *Payne's* open door policy for admitting victim impact evidence presents grave challenges to the prospect of guiding jury discretion.[241]

Wherever one may stand on the correctness of the decision, the firestorm of controversy that was generated by the Court's radical change in precedent cannot be overstated.[242] The decision signaled the beginning of a decade that would see Congress pass a statute to speed up capital punishment signed by a democratic president,[243] witness the Supreme Court be less willing to consider constitutional claims of actual innocence,[244] and watch the Court place a procedural bar on claims raised by defendants on federal habeas review.[245]

Marshall's chambers were "shocked and surprised" at the announcement of his retirement, but his dissent in the *Payne* decision "reveal[ed] the distance between Marshall and his colleagues." JUAN WILLIAMS, THURGOOD MARSHALL, AMERICAN REVOLUTIONARY 391 (1998).

236. *Cf.* José Felipé Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 368 (1997).

237. *See* Susan Anniece Jump, Comment, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1213 (1987) ("[T]he rights of defendants convicted of capital crimes cannot be sacrificed or infringed upon due to concern for the victims.").

238. *See* Charlton T. Howard III, Note, Booth v. Maryland-- *Death Knell for the Victim Impact Statement?*, 47 MD. L. REV. 701, 731 (1988) ("A formalized role for the victim at sentencing, no matter what its specific form, detracts from the sentencing authority's focus on the defendant and imperils the very concept of individualized sentencing.").

239. *See* Anderson, *supra* note 236, at 408-13 (discussing the potential confrontation clause problems that exist with the use of victim impact evidence).

240. *See id.*

241. *See id.*

242. *See generally* Ranae Bartlett, Note, Payne v. Tennessee: *Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561 (1992) (maintaining that the court blatantly ignored precedent).

243. President Clinton signed into law a federal bill allowing states that met certain criteria to speed up executions. *See* 28 U.S.C. §§ 2254, 2255, & 2266 (Supp. IV 1998).

244. *See* Coleman v. Thompson, 113 S. Ct. 853 (1993) (holding that actual innocence claims based on new evidence does not give rise to federal habeas relief).

245. *See* Lockhart v. Fretwell, 113 S. Ct 838 (1993).

Although the Court did not deny all relief for capital defendants during the decade,[246] many cases chipped away at much of the procedural protection that was designed to place controls and limitations on the discretion of the capital jury.[247]

VIII. DECADES OF FAILURE IN *WEEKS*

The first capital punishment case decided by the Supreme Court in the new millennium regarding jury instructions reflects the trend to provide only a lukewarm commitment to maintain heightened control over death penalty juries. In *Weeks v. Angelone*,[248] Chief Justice William Rehnquist held that the constitution was not violated when a trial judge directed a capital jury's attention to a specific paragraph of an instruction he had already given that addressed mitigation in response to their question seeking clarification.[249]

The defendant, Lonnie Weeks, Jr., was riding as a passenger from Washington D.C. to Richmond, Virginia.[250] Weeks had stolen the vehicle a month earlier during a prior crime.[251] The vehicle was being driven by his uncle, Lewis Dukes, and he was speeding which caught the attention of a Virginia State Trooper on traffic patrol named Jose Cavzos who "activated his emergency lights and took chase."[252] Eventually, Dukes stopped on an exit ramp.[253] Approaching the vehicle on the driver's side, the officer requested the driver to stand near the rear of the vehicle.[254] He also asked Weeks to leave the vehicle, and as Weeks did so he fired six bullets at the trooper, two of which entered his body, killing the trooper within minutes.[255] Weeks was arrested the next morning and confessed during routine processing by a classification officer, "indicating that he was considering suicide because he shot the trooper."[256] Also, Petitioner "voluntarily wrote a letter to a jail officer admitting the killing and expressing remorse."[257]

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246. *See* McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (holding that statutory requirements that the jury should be unanimous in finding mitigating evidence is unconstitutional).

247. *See, e.g.*, Blystone v. Pennsylvania, 494 U.S. 299 (1990).

248. 120 S. Ct. 727 (2000).

249. *Id.* at 729.

250. *See id.*

251. *See id.*

252. *Id.*

253. *See id.*

254. *See Weeks*, 120 S. Ct. at 729.

255. *See id.*

256. *Id.*

257. *Id.* at 729-30.

The jury found Weeks guilty of capital murder.[258] In a two day penalty phase, the state sought to prove two aggravating circumstances.[259] First, that "Weeks 'would commit criminal acts of violence that would constitute a continuing serious threat to society'" and second, that his conduct was "'outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery.'"[260] At the penalty phase, the defendant presented nine witnesses and testified on his own behalf.[261] During deliberations the jury asked a question: "Does the sentence of life imprisonment in the State of Virginia have the possibility of parole . . . ?"[262] The judge responded to the question in a manner reflective of the plurality opinion in the Supreme Court's *Caldwell* opinion.[263] He instructed the jury that they should impose a punishment they felt was "just under the evidence, and within the instructions of the Court"[;] they were not to concern themselves with later events.[264]

Later in the deliberations, the jury had another question:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?[265]

The trial judge simply directed the jury to consider the prior instruction regarding mitigation.[266] Two hours later, the jury returned with a verdict of death, concluding that one of the aggravating circumstances had been proven.[267] Weeks' state appeal was rejected,[268] and the federal district and Fourth Circuit Court of Appeals rejected his claims.[269]

Upon review, the Supreme Court found the trial judge's conduct did not violate the Constitution.[270] Reasoning that a "jury is presumed to follow its

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258. *See id.* at 730.
259. *See id.*
260. *Weeks*, 120 S. Ct. at 730.
261. *See id.*
262. *Id.*
263. Caldwell v. Mississippi, 472 U.S. 320 (1985).
264. *Weeks*, 120 S. Ct. at 730 (quoting App. to Pet. for Cert. 90).
265. *Weeks*, 120 S. Ct. at 730 (quoting App. to Pet. for Cert. 91).
266. *See Weeks*, 120 S. Ct. at 730.
267. *See id.* at 731.
268. *See* Weeks v. Commonwealth of Virginia, 450 S.E.2d 379, 391 (Va. 1994).
269. *See* Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999).
270. *See Weeks*, 120 S. Ct. at 732-33.

instructions[,]"[271] it also concluded that "a jury is presumed to understand a judge's answer to its question."[272] The Court further reasoned that:

> Weeks' jury did not inform the court that after reading the relevant paragraph of the instruction, it still did not understand its role . . . . ("Had the jury desired further information, they might, and probably would, have signified their desire to the court. The utmost willingness was manifested to gratify them, and it may fairly be presumed that they had nothing further to ask"). To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer.[273]

The Court also relied on the poll of the jury which indicated that they had considered the mitigating evidence and the two hours of deliberation that the jury completed after the judge's question was considered "empirical factors" supporting its conclusion.[274]

The majority, however, acknowledged that it could not know for certain what transpired during those two hours of deliberations.[275] It believed "the most likely explanation is that the jury was doing exactly what it was instructed to do: that is, weighing the mitigating circumstances against the aggravating circumstance that it found to be proved beyond a reasonable doubt."[276] The Chief Justice concluded that "[a]t best, petitioner has demonstrated only that there exists a slight possibility that the jury considered itself precluded from considering mitigating evidence. Such a demonstration is insufficient to prove a constitutional violation . . . ."[277]

Curiously, the opinion contains commentary on the seriousness of trial counsel regarding the jury instruction issue. Although making no claim that the issue was not properly preserved for review, the Court quipped that

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271. *Id.* at 733.

272. *Id.* The fact that a judge makes no statement tending to sway the jurors against the defendant does not mean that his conduct did not influence the deliberations in other ways. "[V]erbal and nonverbal behavior may have important effects on trial processes and outcomes." Peter David Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775, 777 (1991). His absence of explanation could convey that their question was so unimportant that it did not require a more detailed response. Reading them the same instruction that was given earlier would only confirm the confusion.

273. *Weeks*, 120 S. Ct. at 733. I do not see what would be so wrong with pursuing defense counsel's request for additional clarification. Particularly when the question reflects an utter misunderstanding of the death penalty process.

274. *Id.*

275. *See id.*

276. *Id.* at 733-34.

277. *Id.* at 734.

counsel did not bring the issue up in an oral motion to set aside the verdict.[278] The Court also suggested that appellate counsel had given "low priority and space" to the issue in his appeal to the Virginia Supreme Court, suggesting "that the present emphasis has some of the earmarks of an afterthought."[279]

In a dissenting opinion by Justice Stevens, joined by Justices Ginsberg; Breyer and in part by Justice Souter,[280] he argued that the record of the case established "not just a 'reasonable likelihood' of jury confusion, but a virtual certainty that the jury did not realize that there were two distinct legal bases for concluding that a death sentence was not 'justified.'"[281] Justice Stevens wrote:

> Although it would have been easy to do so, the judge did not give the jurors a straightforward categorical answer to their simple question; he merely told them to re-examine the portion of the instructions that they, in effect, had already said they did not understand. The text of their question indicates that they believed that they had a duty "to issue the death penalty" if they believed that "Weeks is guilty of at least 1 of the alternatives."[282]

Justice Stevens reasoned that, "[w]ithout a simple, clear cut statement from the judge that the belief was incorrect, there was surely a reasonable likelihood that they would act on that belief."[283]

Justice Stevens was also very critical of the majority's analytical approach to the case, particularly its reliance on the presumption of correctness of jury instructions.

> Instead of accepting a commonsense interpretation of the colloquy between the jury and the judge, the Court first relies on a presumption that the jury understood the instruction (a presumption surely rebutted by the question itself), and then presumes that the jury must have understood the judge's answer because it did not repeat its question after re-reading the relevant paragraph, and continued to deliberate for another two hours. But if the jurors found it necessary to ask the judge what that paragraph meant in the first place, why should we

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278. *See id.*

279. *Weeks*, 120 S. Ct. at 734.

280. *See id.* Ironically, some of the family members of the slain officer did not want to see Weeks executed. *See* Brooke A. Masters, *Daughter Seeks Mercy for Father's Killer; Woman Talks to Condemned Man*, WASH. POST, March 10, 2000, at B1.

281. *Weeks*, 120 S. Ct. at 735.

282. *Id.* at 737.

283. *Id.*

> presume that they would find it any less ambiguous just because the judge told them to read it again?[284]

Justice Stevens reasoned that by the majority's "logic, a rather exceptionally assertive jury would have to question the judge at least twice and maybe more on precisely the same topic before one could find it no more than 'reasonably likely' that the jury was confused."[285]

The problems that are evidenced in the Supreme Court's *Weeks* opinion make clear that the Court has not provided adequate supervision to capital juries.[286] Rather, its jurisprudence has permitted them to deliberate in sheer confusion of the complex statutory duty placed upon them. When a jury asks for reinstruction, that does not reflect mere lack of understanding, but rather a consensus that they cannot continue their constitutional duty until further explanation is offered.[287] To simply provide the same instruction previously given over the objection of defense counsel should be considered presumptively unreasonable.[288] This is because it is likely that any misunderstanding will be amplified by failure to clarify the instructions. Like the somewhat analogous situation of urging jurors to reach a verdict, it encourages those who might be inclined to grant life to be discouraged that their efforts to hold out are improper and unlawful. The logic of the Supreme Court in *Caldwell*[289] and *Mills*[290] should be followed in order to enable the judge to err on the side of permitting jurors to make findings that would

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284. *Id.* at 737 (citation omitted).

285. *Id.* at 738.

286. One study examining the questions asked by the capital jury in the *Weeks* case inquired whether jurors are capable of understanding instructions, and it reached the following conclusion: "When the members of a capital sentencing jury say they don't understand a critical instruction, shouldn't the judge be required to answer them with something more than a directive to go back and read the same instruction one more time?" Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 628 (2000). The failure to carefully guide the jury in an area where they expressed a specific concern would have a potentially lethal result. "Consequently, if the *Weeks* jurors had understood that the law never requires death, a unanimous verdict in death's favor would, we think, have been unlikely." *Id.* at 643.

287. To make inquiry of the judge is the clearest indication of misunderstanding. It is clear that the jurors may well have concluded that the trial judge did not take their lack of understanding seriously by simply repeating his earlier charge. At the same time, the judge may have placed too much confidence in the jury's ability to understand and thus "discount[ed] signs that . . . [the] jury . . . [was] having real trouble understanding what . . . [was] going on[.]" Nancy J. King, *Why Should We Care How Judges View Civil Juries?*, 48 DEPAUL L. REV. 419, 420 (1998).

288. It is presumptively unreasonable to assume jurors figured out their earlier concerns without assistance when a life hangs in the balance. On March 16, 2000, Lonnie Weeks was executed by lethal injection. *See Trooper's Killer Executed in Virginia; Officer Was Slain During Stop on I-95*, WASH. POST, March 17, 2000, at B2.

289. Caldwell v. Mississippi, 472 U.S. 320 (1985).

290. Mills v. Maryland, 486 U.S. 367 (1988).

support a life rather than a death sentence.[291] What a tragedy for our jurisprudence to place citizen jurors in a position where they have regret that because of unclear instructions they felt compelled to execute a man when they intended to explore deliberation discussions that may have led to a different result.[292] The criminal justice system would not be greatly burdened by affording full clarity to jurors who wish to fully seek understanding of the role mitigation plays in deciding a capital case.[293]

The *Weeks* opinion turns the notion of guided discretion contemplated by the drafters of the Model Penal Code on its head.[294] Rather than taking extreme care to insure that all benefit of the doubt move in favor of guided discretion, the *Weeks* opinion presents a neutral attitude toward the value of jury control and guided discretion.[295] Jurors start the death penalty process unsure of what is expected of them. There are generally no instructions about aggravating and mitigating circumstances until the penalty phase of the case concludes. Under these circumstances, clear guidance after a request for clarification is the only sensible rule. Perhaps states could draft procedural rules that would require judges to give clearer instructions when jurors have indicated any confusion whatsoever.[296]

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291. *See* William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat From Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737, 738 (1985) (discussing the need for "super Due Process" in the administration of the death penalty).

292. It should be remembered that even a single juror can change a death penalty verdict.

293. Some courts have given little regard to the role of mitigation and the clear explanation of that principle to the sentencing jury. *See* Clozza v. Murray, 913 F.2d 1092 (4th Cir. 1990), *cert. denied*, 499 U.S. 913 (1991) (maintaining that counsel was not ineffective in failing to offer jury instructions regarding mitigation of the sentence).

294. *Compare* MODEL PENAL CODE § 210.6 (1980) *with* Weeks v. Angelone, 120 S. Ct. 727 (2000).

295. One commentator described the attitude of the Rehnquist Court toward capital punishment in this way:

> Justice William Rehnquist has transformed habeas corpus into a thicket of obscure and time consuming procedures that *prevent* federal judges from correcting constitutional errors unless they cast serious doubts on the defendants guilt. Rehnquist's innovations, most of them spun out of thin air, represent his most radical vision: an abandonment of the ideal of a fair trial in favor of a cruder search for something near the truth.

Jeffery Rosen, *Bad Noose, The Non-Rescue of Habeas Corpus*, NEW REPUBLIC, October 4, 1993, at 14.

296. "Without an itemized instruction, the average jury may be unable to extrapolate from the mass of mitigating evidence presented the mitigating circumstances that, in the defense's view, provide independent and sufficient grounds for rejecting the death penalty." Shelley Clarke, Note, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After* Penry v. Lynaugh, 69 TEX. REV. 407, 435 n.142 (1990) (quoting Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 346 (1981)).

The concerns raised in *Furman* and later structured into statutory life in the *Gregg* trilogy of cases[297] are totally lost if the very people who are deciding the case do not understand the very basics of their task.[298] Court decisions that place too many technical barriers to full consideration of death dependant factors, particularly mitigation, should be considered fundamentally unfair.

IX. CONCLUSION

The national experience with capital punishment has been characterized as the struggle of states to retain the punishment while being subjected to a system of constitutional scrutiny.[299] When the Supreme Court in *Furman* first brought the full breadth of procedural concerns together to advise the States of the constitutional concerns, developing adequate procedures became the priority in order to continue to have the option of executions in the States' criminal justice arsenal.[300] Recognizing that controlling juror discretion would be a continuing concern, the Supreme Court began fashioning a jurisprudence which attempted to recognize the reality that jurors cannot be trusted with all the information or be left without guidance about information which has been determined relevant to its decision.[301]

The jurisprudence of the last two decades has been characterized as a loose commitment to controlling capital juries, permitting trial courts a great deal of flexibility in treating capital jury instructions and the introduction of evidence, as if the jurors were deciding a typical criminal case.[302] This was never what *Furman* contemplated, and certainly not what the drafters of the

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297. *See* Hertz & Weisburg, *supra* note 296, at 345-46 (stating that the *Gregg* trilogy of 1976 recognized that "jury instructions are an indispensable device for ensuring that the jury understands and considers the legal effect of the evidence").

298. "It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

299. Although the death penalty is popular in America, "[a]ll of Western Europe, Canada, Australia, New Zealand, most of Latin America, and even some former Communist nations of Eastern Europe have abolished it." JACK GREENBERG, CRUSADERS IN THE COURTS 456 (1994).

300. *See generally* SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 242-43 (1983) (explaining that *Furman* invalidated capital punishment, but it was rejuvenated in part due to public support of re-writing death penalty statutes).

301. Prejudice that may be generated by the emotional impact of the testimony during a jury trial led one American Bar Association Report to suggest that jury consultants be used in capital cases to help determine "what invisible but lethal [amounts] . . . of prejudice may exist in the jury pool[.]" AMERICAN BAR ASSOCIATION, *supra* note 163, at 117.

302. *See, e.g.*, Weeks v. Angelone, 120 S. Ct. 727 (2000). More significantly "the court's decision suggests that trial judges have minimal obligations to clarify instructions for jurors who are confounded by the legal language in a tough capital case." Joan Biskupic, *Death Penalty of Trooper's Killer Upheld*, WASH. POST, Jan. 20, 2000, at A7.

Model Penal Code anticipated.[303] The lack of protection in the capital sentencing process has been particularly troublesome when one examines the unabated discriminatory effect of capital punishment in the post *Furman* era.[304] The less controls that exist on jury discretion, the more likely unconscious racism will enter into the death penalty calculus.[305]

Maybe the only way to establish once and for all that the death penalty is hopelessly entangled with racial discrimination is to have two juries of twelve hear the case, one who is presented with victim impact evidence and one who is not, when the victim and defendant are of different races.[306] A verdict for life from either jury would be sufficient to avoid a death verdict. This would require that both juries receive separate closing arguments and separate deliberations.[307] Jurors who are exposed to victim impact testimony will likely more often give death. Although this would not necessarily be due to racial discrimination, the factor of victim impact would be demonstrated to be the primary factor in cases when both juries do not agree.

Such results would isolate the factor of race in a way that would make it difficult to ignore.[308] In some ways, this approach may be criticized because

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303. Perhaps the well thought out structure and safeguards contemplated by the drafters of the Model Penal Code began to erode from the problem of trying to preserve a penalty that required such a complex design to make it comply with due process. Thus,

> [t]he years since *Furman* have been marked by persistent state efforts to achieve two seemingly inconsistent objectives, and by the Court's encouragement of them in that contradictory quest. The ends are jury discretion unimpeded by too much judicial oversight in imposing the death penalty, and avoidance of the appearance of arbitrariness.

WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 171 (1988).

304. The longstanding discrimination in the criminal justice system, in general, no doubt effects the racial disparity in capital punishment. In his classic work on race in America, Gunnar Myrdal noted that statistics and results in the criminal courts are affected by discrimination in application of the criminal law. *See* GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 966-76 (1962).

305. One observer of the death penalty process has commented that unguided and absolute discretion makes each juror subject to his "prejudices and his subconscious for the keys to decision." MICHAEL MELTSNER, *supra* note 59, at 69 (quoting Brief of Berl I. Bernhard, et. al., as amicus curiae, Maxwell v. Bishop, 398 U.S. 262 (1970) (No. 13)).

306. I envision that this process would occur at the election of the defendant. It would not be a mandatory procedure, since strategic considerations may warrant a lawyer waiving the second jury.

307. Jury instructions need to be revised and tested before they should be used in the death penalty process. *See* Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 232 (1996).

308. There have been some suggestions that racial disparity in the death penalty can be resolved by executing more murderers of blacks. This suggestion advanced by Professor Randall Kennedy is characterized by what is called a "level up solution." *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 344 (1997). While Professor Kennedy has written insightfully on the topic of racial discrimination and

it might be thought to violate equal protection since it establishes a classification based on race.[309] However, the statistical phenomenon that demonstrates racial disparity has been so "staggering"[310] that it may well meet the test for strict scrutiny required to establish racial classifications.[311] Furthermore, as long as cross racial defendants are treated the same and defendants and victims of the same race are treated the same, there may be no equal protection violation for such a procedure.[312]

Another legitimate concern may be whether the expense of seating two capital juries during a case would make such an approach feasible.[313] First of all, two juries sitting at the same time is not unknown to the American criminal process.[314] Although there would be an increase of time to select two juries, considering the import of deciding who should live or die, the cost of additional jurors must be considered a secondary matter.[315] Perhaps after several years of death penalty verdicts where victim impact evidence is denied to one jury deciding the defendant's fate, we may be ready to admit that a

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capital punishment on other occasions, I cannot agree with the "level up" solution. As I have already argued, the death penalty has flaws beyond racial discrimination. I cannot understand how executing more people under an arbitrarily regulated death penalty system can serve a valid curative purpose.

It is tragic that a possible explanation of the racial disparity in the death penalty may well be explained because jurors, judges, and prosecutors generally under value the lives of Black people. However, under no circumstances should the remedy for unfair executions for one group be to increase such executions for all.

309. The Fourteenth Amendment's Equal Protection Clause provides that no state shall deny "any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

310. Callins v. Collins, 114 S. Ct. 1127, 1135 (1994).

311. Indeed, strict scrutiny might be established by the unexplained but troubling and consistent racial disparity regarding black defendants that murder white victims.

312. So long as all cross racial murder defendants are given the opportunity for two juries whether they be white or black, equal protection problems might be avoided. Thus, a white defendant who killed a black victim will also get the benefit of a second jury without victim impact testimony from the black victim's family.

313. The issue of the cost of capital punishment has always factored into decisions about how much protection a defendant is entitled. "Death penalty cases are much more expensive than other criminal cases and cost more than imprisonment for life with no possibility of parole." Richard C. Dieter, MILLIONS MISSPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY, *in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 112, at 401, 402.

314. Procedures where two juries are used during the trial of a criminal case are not unheard of in either federal or state court. *See* United States v. Lebron-Gonzalez, 816 F.2d 823, 831 (1st Cir. 1987) (noting that there is no abuse of discretion for a murder trial to involve five defendants and empanel two juries). *See also* United States v. Hayes, 676 F.2d 1359, 1366-67 (11th Cir. 1982) (explaining that use of a dual panel as an alternative to severance appealed to the appellate court).

315. Added voir dire and calling additional jurors is a minor inconvenience considering the high stakes of an execution. For a detailed account of potential changes in the jury system, see Kelso, *supra* note 186, at 1433-1592.

victim driven capital punishment scheme which leads to chronic racial disparity should be abandoned.[316]

In the meantime, the best way to protect capital cases from being treated like any routine criminal trial is to adopt higher standards of control over capital jury instructions.[317] Requests for reinstruction should be interpreted as jury misunderstanding and should be addressed as a serious matter, not merely by offering the same instruction again.[318] The scientific data on jury behavior, particularly the research that has been conducted since the *Furman* decision, indicates that we should exercise more rather than less control over capital juries.[319]

There also needs to be more research on the use and influence of various jury forms and verdict sheets.[320] Many jury reform plans have contemplated what should be done with sending written instructions into jury deliberations.[321] Traditionally, even written instructions were not permitted

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316. The victim impact controversy goes to the philosophical core of the role of the Supreme Court and the delicate balance between the rights of the accused and those who would severely limit their protection.

In a memorandum written by one of Justice Thurgood Marshall's law clerks while the issue was to be considered by the Supreme Court illustrates the point. The memo urged Justice Marshall to "[f]ight like hell on this one[,]" because "[Marshall's] prior rejection of retribution as a justification for the penalty, plus the risk of arbitrary results, should make this a close case legally and morally for the right wingers." BENCH MEMORANDUM TO JUSTICE MARSHALL *in re Booth v. Maryland* at 7, March 24, 1987 (reproduced from the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress).

317. The Supreme Court has recognized that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99 (1983).

318. *See* Weeks v. Angelone, 120 S. Ct. 727, 735 (2000) (Stevens, J., dissenting). One commentator feared that the decision in *Weeks* would leave jurors confused. Professor Paul Marcus said that "jurors get so little guidance. To say judges have no requirement to assist them will simply lead to greater misunderstandings, particularly in death penalty cases[.]" Biskupic, *supra* note 302, at A7.

319. One commentator has insightfully noted that "the Court continues to rely on intuitive assumptions of juror infallibility. The enormity of the capital sentencing decision mandates a more critical scrutiny of jury instructions, including juror comprehension. . . . Empirical research, contradicting the Courts assumptions, indicates that jurors do not fully comprehend their instructions." Susie Cho, Comment, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 561 (1994).

320. Some have argued that a written record of findings in death penalty cases is important. *See* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV, 655, 698-710 (1989).

321. Some studies have suggested that written instructions do not matter. *See Written Pretrial Instructions Needed by Jury, Study Says*, NAT'L L.J., Jan. 3, 1983, at 43. (reporting study of researchers who concluded that juries that receive no instructions at all make about the same number of misinterpretations of the law).

for the jury because they have sometimes been viewed as having too much influence over the deliberations.[322]

The Supreme Court has demonstrated a reluctance to control the discretion of capital juries in a way that would guard against any possible error in the understanding of their task. This is a disappointment considering our history of an arbitrary and discriminatory death penalty. Perhaps the Court, in its zeal to retain the penalty because of its popularity, has given too much control to juries by not exercising every presumption that the death sentence is neither expected or preferred, thus losing cite of the objective that the penalty should be available only to a narrow class of murders.[323]

Once juries are free to consider death it may well be that the late Justice Blackmun was correct when he pondered whether the system had simply reduced the number of people subject to an arbitrary penalty.[324] At the center of the debate stands the trial by jury which serves as a buffer to the death penalty when it is appropriately controlled. Since the death penalty will likely continue to be used, dignity, due process, and fundamental fairness require that we mortar its walls of procedural protection with sterner stuff.[325]

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322. Some researchers have expressed considerable doubt about whether juries obey written instructions at all. It has been noted that "American juries, bound by formally mandatory instructions, undoubtedly disregard these instructions more than occasionally[, and] . . . calling judicial instructions mandatory or advisory does not determine how often the instructions are followed." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 914 (1994).

> Undisputed procedures--the general verdict, the principle of non-coersion of jurors, and the inability to direct verdicts of conviction--ensured both nineteenth- and twentieth-century American juries the practical power to "acquit against instructions." The general verdict and the principle of non-coercion of jurors frequently ensured the power to "convict against instructions" as well.

Id.

323. Some scholars have vigorously argued that the irrevocability of capital punishment "should be subject to strict scrutiny." *See* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1029-30 (1978).

324. *See* Callins v. Collins, 114 S. Ct. 1127, 1134 (1994).

325. *See generally Ezekiel, supra* note 1, at 13:12.